IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 836 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHARATBHAI K PATEL

Versus

C L VERMA(SINCE DECEASED) THRO' POA-SURJIT SINGH MACKER

Appearance:

1. Criminal Misc.Application No. 836 of 2001

MR RD DAVE for Petitioner No. 1

RULE NOT RECD BACK for Respondent No. 1

MR VM PANCHOLI ADDL PUBLIC PROSECUTOR for Respondent No.2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 08/03/2002

CAV JUDGEMENT

#. This is a petition filed under Section 482 of Cr.P.C. against the complaint, whereby the original

accused of the complaint being Criminal Case No.1010/1998 filed by the respondent No.1 Mr.C.L.Varma through power of attorney holder in the Court of Metropolitan Magistrate, Ahmedabad [Court No.3] for the offence punishable under Section 138 of Negotiable Instruments Act has prayed that the complaint and the criminal case registered be quashed and set aside. A private complaint has been filed by the power of attorney holder Mr.Surjeet Singh Macker on behalf of Mr.C.L.Verma. Mr.C.L.Verma was Chairman of Continental Textile Mills Limited, situated at Naroda road, Ahmedabad. After recording the statement on oath of Mr.Surjeetsingh Macker, the Metropolitan Magistrate issued process of the above referred punishable offence. Certified copy of Power of Attorney produced by the complainant before the Metropolitan Magistrate Court is available at Annexure-B. It is a "Specific Power of Attorney" by Executive Director for Continental Textile Mills Limited.

#. It is say of the petitioner that he did appear before the learned Metropolitan Magistrate in the proceedings and submitted application to drop the proceedings for various grounds. But the learned Metropolitan Magistrate has rejected the application vide order dated 1st December, 2000. The petitioner felt that the order of learned Metropolitan Magistrate has been passed under some confusion or misunderstanding and therefore, another application was moved by the petitioner and the said application has also been dismissed because the learned Metropolitan Magistrate felt that "no rehearing is required".

#. To appreciate the case of the present petitioner, it would be proper to state the case pleaded in the complaint in nutshell. It is submitted by the complainant that the petitioner - original accused Shri Bharatbhai K. Patel approached Shri C. L. Verma and intended to take over Continental Textiles Mills Limited situated at Naroda Road, Ahmedabad and this Bharatbhai K. Patel had agreed to pay all the accrued liability of the mill plus Rs. 11.00 crores for taking over the said mill. Undisputedly, at that time, there was an Industrial Dispute pending between workers and the Mill Company. Mr.C.L.Verma personally was assured by Mr.Bharat K. Patel that he will be able to successfully negotiate with the workers of Continental Textile Mill Limited. Mr.C.L. Verma, Chairman, Continental Textile Mill Limited therefore vide letter dated 3rd July, 1998 directed Mr.Mann to issue a letter of authority on date 4th July, 1998 with the terms as stated in the letter dated 3rd July, 1998. The accused Mr.Bharatbhai K.

Patel paid Rs.11.00 lakhs by way of demand draft towards earnest money and also he issued a cheque of Rs.1.00 crore payable to Mr.C.L.Verma drawn in favour of the Bank of India, Saraspur Branch, Ahmedabad dated 14th July, 1998. The complainant, in short, has placed reliance mainly on three important aspects i.e. [i] letter dated 3rd July, 1998 and his meeting between Mr.C.L.Verma and the accused in the early days of July, 1998 and issuance of cheque of Rs.1.00 crore dated 14th July, 1998, [ii] this cheque of Rs.1.00 crore was deposited on 14th July, 1998 with UCO Bank, Bhadra Branch, Ahmedabad in the account No.P1 of Shri C.L.Verma, and [iii] the said cheque was not honoured by the Bank of India and was returned on 22nd July, 1998. Thereafter, statutory notice has been served through Advocate. The complainant also relies on pleadings of Civil Suit No.5192/1998 where the petitioner - original accused Shri Bharatbhai K. Patel has denied the liability of Rs.1.00 crore.

#. It is important to refer the case put forward by the petitioner reflected in para-2.1 to 2.3 and para-3 of the petition. For the sake of convenience, I would like to quote :-

"2.1 The petitioner submits that Bharat Vijay Mills Limited was taken over by Continental Textile Mills Limited in September, 1986, which is situated at Naroda Road, Ahmedabad of which Mr.C.L.Verma [now deceased] was and his family members were holding majority of shares of the said company. The registered office of Continental Textile Mills Ltd. [hereinafter referred to as "CTM" for short] was situated at New Delhi. The petitioner further states that, CTM was in financial crisis and in the year 1992 CTM could not pay its electricity bills of more than Rs. One crore, therefore, ultimately from 2-2-1992 production of the mill company was stopped and on 5-2-1992 closure of the mills company was declared. There was tremendous industrial unrest amongst the workers and therefore various cases were filed by the trade union and workers in the Labour Court for recovery of its dues being Recovery Application No.1471/1997, 2545/95, 2953/1995 etc. Payment of Wages Application No.725/1992 and 114/1993 was also filed by Textile Labour Association [TLA] on behalf of the workers. Criminal Case No.100/92 under Section 25-R of the Industrial Disputes Act was filed by TLA before Labour

Commissioner. The company CTM had preferred Reference before BIFR under Sick Industrial Companies [Special Provisions] Act, 1985, which came to be rejected on 29-4-1994. Therefore, considering various Recovery Applications mentioned above and others, there was liability upon CTM to pay more than Rs.22 crores. The Labour Court on 30th September, 1997 passed orders in two Recovery Applications being No.2595 and 2953 of 1995 directing CTM to pay Rs.6,63,14,602-15 to about 600 workers, pursuant to which, on 12-1-1998 Recovery Certificate was also issued to the Collector, Ahmedabad, to recover the amount by way of land revenue.

2.2 Petitioner submits that, under aforesaid circumstances Mr.C.L.Verma and other directors of the Company and their friends and relatives decided to sell their shares and they were in search of a person who could take over the company by such transfer of shares. On 16-2-1998 the petitioner approached Mr.C.L.Verma by writing a letter and expressed his interest in purchasing the property. Said letter was under consideration of the Company for long period. Thereafter, Mr.C.L.Verma addressed a confidential letter dated 3-7-1998 to its Manager Mr.A.S.Mann at Ahmedabad introducing the petitioner and mentioned various facts about inclination of petitioner who would be able to settle the dispute with workers of CTM by negotiations. For that purpose Mr.Verma requested Mr.Mann to issue letter to the petitioner for the said purpose. It is further mentioned therein that the petitioner will give a cheque of Rs.One crore payable on 14th at Ahmedabad without insisting on Banks endorsement.

2.3 Accordingly, as per the understanding with Mr.C.L.Verma a cheque of Rs.One crore was handed over to Mr.Mann towards consideration and value of shares which is to be transferred in the name of the petitioner. The petitioner also paid Rs.21 lacs by demand draft to CTM towards such arrangement. It is further submitted that in the mean time, Special Civil Application No.3418/1998 was filed by the workers in this Honourable Court seeking direction to Collector, Ahmedabad to initiate and complete recovery proceedings within the statutory period. CTM was served through its General Manager and he appeared in the

proceedings. This Hon'ble Court passed an order on 13-8-1998 giving appropriate directions to the Collector to attach and sell the property of CTM. Thereafter, on 20-8-1998 Textile Labour Association submitted Misc. Application No.1542/98 seeking direction to recall the order dated 13-8-1998 and to amend the order by issuing directions to CTM not to disburse the amount etc. On 29-8-1998 a settlement between workers union of the Company through Mr.A.S. Mann, General manager was arrived at under Section 2[P] of the Industrial Disputes Act. The petitioner was also allowed to join as party in the said proceedings as he was present. In the settlement the payment schedule was fixed and accordingly parties were to act. Therefore on 29-8-1998 this Hon'ble Court accepted the undertaking and the settlement between the parties and substituted the order dated 13-8-1998 by the terms of settlement on record. There are many further facts which are not stated at present. However, subsequently the CTM filed Misc. Civil Application No.2409/1998 in the said Special Civil Application No.3418/1998 on the ground that the order dated 29-8-1998 is obtained by fraud as Mr.A.S. Mann was never been authorised to sign and accept any such settlement and he has colluded with the petitioner etc. After hearing the parties, this Honourable Court passed an order on 1-12-1998 allowing the application and rejecting the order dated 29-8-1998 passed in Misc. Civil Application No.1452/1998 and order dated 13-8-1998 was restored in the petition. This Hon'ble Court held Mr.C.L.Verma also responsible for which cost of Rs.40,000/- was imposed. This judgment is reported in 1999 [1] GLH pg.948. Therefore, instead of narrating the facts the petitioner craves leave to refer to and and rely upon said judgment at the time of hearing.

3. Petitioner submits that, therefore as per the said judgment Mr.C.L.Verma strongly disputed the transaction of transfer of shares for Rs.One crore and vehemently denied and disputed any authorisation to Mr.A.S.Mann, General Manager of CTM and refused to have entered into any transaction with the petitioner for sale of shares and thereby transfer of management. Despite that the present complaint came to be filed by Mr.C.L.Verma through power of attorney holder of CTM inter alia stating the facts which

are totally contrary to what is contended by this honourable Court in the above proceedings. The petitioner submits that, cheque was issued specifically in the personal name of Mr.C.L.Verma towards consideration of transfer of share and the cheque has never been issued in the name of CTM - the Company. Since Mr.C.L.Verma was not inclined to transfer the shares as it appears from the aforesaid facts, there is no question of honouring cheque of Rs.One crore or making payment thereof which was given towards consideration of transfer of shares. It is submitted that, since there is no transfer of shares, there is no consideration for payment and as such there is no obligation to make payment of Rs.One crore to Mr.C.L.Verma by the petitioner. Therefore, the ingredients of section 138 are not attracted. Move over the complaint itself is not competent and is not filed by a competent person in as much as the fact that Mr.Surjit Singh Macker was holding special power of attorney on behalf of M/s. Continental Textile Mills Limited as it is clear from the document of Special Power of Attorney produced with the complaint. Whereas in the present case, cheque which was issued in the personal name of Mr.C.L.Verma and not in the name of the company. Therefore the company is not the drawee and as such the power of attorney holder of the company is not competent to file a complaint for Mr.C.L.Verma and as such the present complaint suffers from the said basic lacuna and as such the complaint is not maintainable. .... "

#. On careful consideration of the averments made in the complaint and the copy of the power of attorney deeds, the say of Mr.Rajesh Dave, learned counsel shall have to be accepted that Mr.Surjeet Singh Macker, on the date of complaint was not power of attorney holder of Mr.C.L.Verma nor there was any authority with said Mr.Macker to file complaint on behalf of Mr.C.L.Verma. Absence of specific power of attorney is very relevant in present case. Mr.C.L.Verma has already died before few months ago. So, it is rightly argued that therefore, no such power of attorney exists even if it had been given. The cheque of Rs.1.00 crore was given by the petitioner to Mr.C.L.Verma in his individual capacity for his personal transaction of transferring of his shares and therefore, the petitioner was not concerned with Continental Textile Mills Ltd as there was no legal debt

qua Mill Company. The petitioner was not in any way obliged or required to pay any amount to Continental Textile Mills. This can be said to be a defence plea only. The complainant on specific allegations has to show a prima facie legal liability of the accused and in doing so, he can take advantage of the scheme of the Act i.e. Section 139 Presumption etc. Two affidavits filed by Mr.C.L.Verma in MCA NO.2409/98 in SCA No.3418 / 1998 dated 14th November, 1998 and 23rd November, 1998 are also very relevant. The deponent viz. Mr.C.L.Verma on whose behalf the criminal complaint has been filed, has categorically stated that there was negotiation for transfer of shares of Continental Textile Mills Ltd. held by Mr.C.L.Verma and his associates to Mr.Bharatbhai K. Patel. However, there was no firm offer and there was no concluded contract and there is also no acceptance of any kind in regard to sale of shares for transferring or taking over the Mill by Mr.Bharatbhai K. Patel. If this version of Mr.C.L.Verma is accepted that there was no concluded contract, nor transfer of shares, for which, cheque of Rs.1.00 crore was given, then, obviously the petitioner cannot be asked to face criminal proceedings for his alleged failure in fulfilling the obligation to pay this amount of Rs.1.00 crore on service of statutory notice. The petitioner has satisfactorily brought on record that he was not under any legal or valid enforceable debt or other liability. During the course of submissions, learned counsel Mr.Rajesh Dave appearing for petitioner has taken me through two relevant decisions, of which, first is reported in 1995 [1] GLR pg.424 in case of DIPENDRA CHOKSHI & OTHERS V. K.C.DHOOT, where this Court has held that the Court can take cognizance of the offence punishable under Section 138 and 142 of the Negotiable Instrument Act only if the complaint is filed in writing by payee or holder in due course of the cheque. In the present case, the complainant Mr.Surjeet Singh Macker is neither payee nor holder in due course. He is not holder of power of such person. The another decision reported in 1999 [1] GLH pg.984 which can be said to be a case between the very parties of this petition viz. Continental Textile Mills and others Vs. B.K.Patel, present petitioner. Para-28 of this judgment is relevant and it is observed by the Court in reference to facts available on record that;

"28. At this juncture it would be necessary to deal with the conduct of Mr.C.L.Verma, Chairman of the Company as well. [emphasis supplied]. It is difficult to believe that he is as innocent person as he has tried to project himself in this Miscellaneous Application. Mr.Verma had sent a

letter dated 3-7-1998 to Mr.Mann introducing the first respondent Mr.Bharat Patel. As per the understanding between Mr.Patel and Mr.Verma the first respondent issued a cheque dated 14-7-1998 for a sum of Rs.1 crore. The cheque was dishonored as per the communication of the Bank dated 20-7-1998. But Mr.Verma did not react thereon. Not only this, in order of this Court dated 13-8-1998 a liberty was obtained by the employer to approach the Collector and satisfy him whatever proposal they have. Just after few days on 29-8-1998 the settlement was produced and the impugned order was passed. There was no activity for the entire month of September, 1998, in spite of the clear statement made that the Mill has been sold to Mr.Patel. Again on 8-10-1998 the cheque of Rs.One crore was resumbitted which was dishonoured and an information in that regard was received on 12-10-1998. Mr.Verma deliberately concealed the circumstances which led him to resubmit the cheque on 8-10-1998. In a complaint filed under Section 138 of the Negotiable Instruments Act, first time it is stated on behalf of the Company that there was a consideration of Rs.11 crores. This fact has not been stated in this Miscellaneous Civil Application. Of course, Mr.S.S.Macker, Vice President of the Company in his affidavit has stated that the fact has been stated in the complaint as per the legal advice. This speaks in volumes of the conduct of Mr.Verma and his officers that they can make false statements with impunity if they are so advised by their legal advisers. It is further interesting to notice that in spite of the fact that the impugned order was passed on 29-8-1998 the present Miscellaneous Civil Application has been filed as late as on 3-11-1998. It is difficult to conceive that Mr.Verma was completely ignorant of happening during the period 20-7-1998 to 29-8-1998 and subsequent thereto. After all he is a matured businessman. Even if he was sick, the Company must be having its network of communication. Somebody from the Head Office must be in contact with the Officers of the Mill. There appears to be some truth in the statement of Mr.Mann that he had been in telephonic contact with Mr.Verma and there were verbal instructions on the basis of which he acted. In saying so, I have not entered into the disputed question of fact as to whether the

statement of Mr.Mann is correct or not which could be properly adjudicated in a proper forum. But so far as the present Miscellaneous Civil Application is concerned, it appears that there was a live link between Mr.Verma, Mr.Mann and Mr.Patel. Mr.Verma has chose to deliberately conceal certain material facts. Suffice it to say that Mr.Verma has not come before this Court with clean hand. ..... "

#. This Court is aware about the ratio of the decision of the Apex Court in case of M/s. M.M.T.C. Ltd. & Another v. M/s Medchl Chemicals and Pharma [P] Ltd. and Another reported in 2001 AIR SCW 4793, where the Apex Court has said that;

"... It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and / or come to a conclusion that there was no existing debt or liability.

It is further held in the very judgment that;

"There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

#. The case of K.N.BEEENY [2001 [7] SCALE 3] also says that "under Section 139 of the Negotiable Instrument Act, the Court has to raise presumption that in complaint under Section 138, the cheque had been issued for debt or liability".

#. With respect, ratio of above judgments would not help the complainant on available set of facts. Though, Section 139 of the N.I.Act provides for presumption, the Court while dealing with petition under Section 482 of CrPC, is supposed to see and appreciate whether [i] Where

the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, [ii] Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused and [iii] Where a criminal proceeding is manifestly attended with mala fide and/or where the proceedings is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

#. An attempt to rebut legal presumption at initial stage of proceedings is not and cannot be barred but if such an attempt, if made, must be very well founded and above the convincing standard of preponderance of probabilities. The reply to statutory notice is a stage from where it can be shown that the allegations made are absurd, improbable malafide and no prudent person can ever reach a just conclusion that there is sufficient ground to proceed against the accused. In the present case, the petitioner has satisfactorily established the basic infirmity in the complaint and its maintainability. It is obligatory on the part of the accused to rebut the legal presumption but perusal of statement of Mr.C.L.Verma and the stand taken by the associates of Bharat Vijay Mills / Continental Textile Mills in civil litigation including Mr.C.L.Verma referred hereinabove, provides sufficient rebuttal at this stage. Normally, this Court is supposed to read the averments made in the complaint and at the initial stage of the proceedings, the High Court is not justified in entertaining and accepting the plea that there was no debt or liability. Defence plea cannot be entertained in quashing proceedings. But in the cases where the petitioner is able to show to the Court that there was no existing debt or liability at the time of presentation of the cheque for encashment on the basis of the conduct of the complainant or admissions made by the complainant that may be in other legal proceedings, then in such cases, the proceedings can be terminated and the accused should not be asked to face the trial till it concluded. So, this Court inclined to allow this petition as the petitioner has successfully rebutted the presumption at initial stage and has pointed out the basic infirmity as to maintainability of the proceedings.

##. In the result, petition is allowed. Criminal Complaint dated 21-11-1998 being Criminal Case No.1010 of

1998 pending in the court of Metropolitan Magistrate, Ahmedabad [Court No.3] are hereby quashed and set aside. Rule is made absolute accordingly. Yadi be sent to the concerned Court.

Date : 8-3-2002 [C.K.Buch, J.]

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